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Maxland Sdn Bhd v Timatch Sdn Bhd

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(i)-88–11 OF 2012 (S)

ARIFIN ZAKARIA CHIEF JUSTICE, ZULKEFLI CJ (MALAYA), ABDULL HAMID EMBONG, AHMAD MAAROP AND ZAINUN ALI FCJJ

24 JULY 2014

Civil Procedure — Writ of summons — Indorsement, general — Judgment in default — Claim for damages — Restraining order for trespass — Judgment in default of appearance entered — Rules of the High Court 1980 O 13 — Judgment obtained before service of statement of claim — Whether liable to be set aside ex debito justitiae

The respondent ('the plaintiff') had taken out a generally indorsed writ against the appellant ('the defendant') on 30 December 2010, claiming for damages and a restraining order ('the injunction') for an alleged act of trespass by the defendant. On 29 January 2011, the plaintiff posted the writ at Kota Kinabalu to the defendant's address in Sandakan. The dates 3–4 February 2011 were public holidays as they were the Chinese New Year festival. However, the defendant claimed to have received the writ on 8 February 2011 and went on to enter appearance on 16 February 2011 at about 2.32pm. On the same day, at about 5.12pm, the plaintiff issued a certificate of non-appearance and then entered a judgment in default against the defendant ('JID') as it was the plaintiff's argument that by virtue of s 12 of the Interpretation Acts 1948 and 1967, the defendant was presumed to have received the writ on 2 February 2011. Hence, it was submitted by the plaintiff that the defendant was out of time when it entered appearance only on 16 February 2011, and not within the prescribed ten-day period. Dissatisfied, the defendant applied to set aside the JID, but the application was dismissed as it was held that the JID was regularly obtained; and that the defendant had failed to prove that the writ was received by them on 8 February 2011. On appeal, the Court of Appeal affirmed the decision of the High Court and held that the JID was a regular judgment. The issues that arose in the present appeal were (i) whether it was mandatory for the plaintiff to serve a statement of claim on the defendant and to proceed with the action as if the defendant had entered appearance under O 13 r 6(1) of the Rules of the High Court 1980 ('the RHC') when a writ was indorsed generally with claims for damages and restraining order; and (ii) if the answer was in the affirmative, whether a judgment in default of appearance obtained before the statement of claim served was therefore irregular and may be set aside *ex debito justitiae*.

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Held, allowing the appeal with costs:

(1) The plaintiff had indorsed its writ with a general statement allegedly for trespass against the defendant. The generally indorsed writ showed that they were seeking for a restraining order and damages. Under O 13 r 6(1) of the RHC, it is mandatory for the plaintiff to serve a statement of claim on the defendant and proceed with the action as if the defendant had entered an appearance, which the plaintiff failed to comply. The JID was in breach of O 13 r 6(1) of the RHC and was hence liable to be set aside *ex debito justitiae* (see paras 21–22 & 25).

(2) The defendant was in a weak position to argue again on the issue that the writ was received by them on 8 February 2011. While the presumption of posting was rebuttable, the courts below found on the evidence available that the defendant had not rebutted the presumption (see para 20).

(3) The prerequisite for the operation of O 13 rr 1–6 of the RHC was dependent on the type of claims indorsed on the writ by the plaintiff and not on what was subsequently contained in the default judgment. The plaintiff entered the JID under O 13 r 2 of the RHC in respect of one of its claims, namely 'damages to be assessed' despite the fact that it had also claimed for a restraining order. The indorsement on the writ was not for unliquidated damages only. The plaintiff had indorsed its writ with a general statement allegedly for trespass against the defendant, principally claiming for specific relief, namely a restraining order. The claim for general damages was a mere adjunct to the main relief and could not be construed to be an alternative claim (see para 29).

[Bahasa Malaysia summary

Responden ('plaintif') telah mengemukakan writ yang telah diindorskan secara am terhadap perayu ('defendan') pada 30 Disember 2010, dengan menuntut ganti rugi dan perintah sekatan ('injunksi') untuk perbuatan yang dikatakan menceroboh oleh defendan. Pada 29 Januari 2011, plaintif telah menghantar melalui pos writ itu di Kota Kinabalu kepada alamat defendan di Sandakan. Tarikh-tarikh 3–4 Februari 2011 merupakan cuti awam iaitu perayaan Tahun Baru Cina. Walau bagaimanapun, defendan mendakwa telah menerima writ itu pada 8 Februari 2011 dan seterusnya memasukkan kehadiran pada 16 Februari 2011 pada kira-kira 2.32 petang. Pada hari yang sama, kira-kira 5.12 petang, plaintif telah mengeluarkan sijil ketidakhadiran dan kemudian memasukkan penghakiman ingkar terhadap defendan ('PI') kerana plaintif berhujah bahawa menurut s 12 Akta Tafsiran 1948 dan 1967, defendan telah dianggap menerima writ itu pada 2 Februari 2011. Walau bagaimanapun, adalah dihujahkan oleh plaintif bahawa defendan telah di luar had masa apabila memasukkan kehadiran hanya pada 16 Februari 2011, dan bukan dalam tempoh sepuluh hari yang ditetapkan. Berasa tidak puas hati, defendan telah memohon untuk mengetepikan PI itu, tetapi permohonan itu telah

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ditolak kerana diputuskan bahawa PI itu telah teratur diperolehi; dan bahawa defendan telah gagal membuktikan bahawa writ itu telah diterima oleh mereka pada 8 Februari 2011. Atas rayuan, Mahkamah Rayuan mengesahkan keputusan Mahkamah Tinggi dan memutuskan bahawa PI itu adalah penghakiman yang teratur. Isu-isu yang timbul dalam rayuan ini adalah (i) sama ada ia mandatori untuk plaintif untuk menyampaikan penyataan tuntutan ke atas defendan dan untuk meneruskan dengan tindakan seolah-olah defendan telah memasukkan kehadiran di bawah A 13 k 6(1) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') apabila writ itu diindorskan secara am dengan tuntutan ganti rugi dan perintah sekatan; dan (ii) jika jawapan adalah afirmatif, sama ada penghakiman ingkar kehadiran yang diperoleh sebelum penyataan tuntutan disampaikan adalah dengan itu di luar aturan dan boleh diketepikan *ex debito justitiae*.

Diputuskan, membenarkan rayuan dengan kos:

(1) Plaintif telah mengindorskan writnya dengan kenyataan am yang dikatakan kerana menceroboh terhadap defendan. Writ yang diindorskan secara am menunjukkan bahawa mereka memohon untuk perintah sekatan dan ganti rugi. Di bawah A 13 k 6(1) KMT, adalah mandatori untuk plaintif menyampaikan penyataan tuntutan ke atas defendan dan meneruskan dengan tindakan seolah-olah defendan telah memasuki kehadiran, yang mana plaintif telah gagal untuk mematuhinya. PI adalah pelanggran A 13 k 6(1) KMT dan justeru boleh diketepikan *ex debito justitiae* (lihat perenggan 21–22 & 25).

(2) Defendan berada dalam keadaan rapuh untuk berhujah lagi tentang isu bahawa writ itu telah diterima oleh mereka pada 8 Februari 2011. Apabila andaian pengeposan boleh dipatahkan, mahkamah bawahan mendapati berdasarkan keterangan sedia ada bahawa defendan tidak mematahkan andaian itu (lihat perenggan 20).

(3) Prasyarat untuk pelaksanaan A 13 kk 1–6 KMT 1980 adalah bergantung kepada jenis tuntutan yang diindorskan pada writ oleh plaintif dan bukan pada apa yang akhirnya terkandung dalam penghakiman ingkar. Plaintif telah memasukkan PI di bawah A 13 k 2 KMT berkaitan salah satu tuntutannya iaitu 'damages to be assessed' meskipun sebenarnya ia juga telah menuntut untuk perintah sekatan. Pengindorsan pada writ itu bukan hanya untuk ganti rugi bukan jumlah tertentu. Plaintif telah mengindorskan writnya dengan kenyataan am yang dikatakan untuk pencerobohan terhadap defendan, terutamanya menuntut relief spesifik, iaitu perintah sekatan. Tuntutan untuk ganti rugi am hanya tambahan kepada relief utama dan tidak boleh ditafsirkan sebagai tuntutan alternatif (lihat perenggan 29).]

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Cases referred to

Asia Commercial Finance (M) Berhad v Bank Bumiputra Malaysia Berhad & Ors [1988] 1 MLJ 33 (refd)
Badrul Zaman bin PS Md Zakariah v Tamil Nesan (M) Sdn Bhd & Ors [2001] 4 MLJ 403, HC (refd)
Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor [1997] 2 MLJ 565, FC (consd)
Morley London Developments Ltd v Rightside Properties Ltd (1973) 231 Estates Gazette 235, CA (distd)
Pengkalen Concrete Sdn Bhd v Chow Mooi (guarantor of Kin Hup Seng Construction Sdn Bhd) & Anor [2003] 3 MLJ 67; [2003] 6 CLJ 326, HC (refd)
Taman Pangkor Sdn Bhd v Doric Development Sdn Bhd & Ors [1987] CLJ (Rep) 1008, HC (refd)
Tan Tin Swee v Kangar Properties Sdn Bhd [1990] 3 MLJ 167; [1990] 3 CLJ (Rep) 199, HC (refd)
Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd [1996] 1 MLJ 30, FC (refd)
White v Weston [1968] 2 All ER 842, CA (refd)
Yap Ke Huat & Ors v Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor [2008] 5 MLJ 112, CA (distd)

Legislation referred to

Advocates (Practice and Etiquette) Rules 1988 r 56
Interpretation Acts 1948 and 1967 s 12
Rules of the High Court 1980 O 13, O 13 rr 1, 2, 3, 4, 5, 6, 6(1)
Rules of the Supreme Court 1965 O 19 rr 3, 7

Jeyan Marimuttu (Chang Yaw Chung @ Jimmy with him)(J Marimuttu & Partners) for the appellant.
David Fung (Syarulnizam Salleh with him)(Alex Pang & Co) for the respondent.

Zulkefli CJ (Malaya) (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by the appellant against the whole decision of the Court of Appeal in dismissing the appellant's appeal against the decision of the High Court at Sandakan. The High Court had dismissed the appellant's application to set aside the certificate of non-appearance dated 16 February 2011 and the judgment in default of appearance ('the JID') entered by the respondent against the appellant and for the appellant to be granted leave to file and serve its statement of defence within two weeks from the date that the statement of claim is served on them and for a further order that the hearing for assessment of damages be set aside. The appellant was the defendant and the

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respondent was the plaintiff before the High Court. For convenience the parties will be referred to as they were before the High Court.

LEAVE TO APPEAL

[2] This court granted leave to the defendant to appeal against the decision of the Court of Appeal on the following two questions of law:

(a) where a writ is indorsed generally with claims for damages and restraining order, whether it is mandatory for the plaintiff to serve a statement of claim on the defendant and to proceed with the action as if the defendant had entered an appearance under O 13 r 6(1) of the Rules of the High Court 1980 ('the RHC 1980'); and

(b) if the answer is in the affirmative, whether a judgment in default of appearance obtained before the statement of claim is served is therefore irregular and may be set aside *ex debito justitiae*.

BACKGROUND FACTS

[3] The sequence of dates is relevant and of importance in this appeal. The relevant background facts in accordance with the sequence of dates are these.

[4] On 30 December 2010 the plaintiff took out a generally indorsed writ against the defendant claiming for damages and a restraining order (injunction) arising out of the defendant's wrongful action in trespass. It was alleged that the defendant had intentionally or negligently injured the raw water transmission pipeline and valve chamber along Jalan Ulu Sibuga in the District of Sandakan which was used and maintained by the plaintiff for the supply of water to its treatment plant. On 29 January 2011 the plaintiff posted the writ on Saturday at Kota Kinabalu to the defendant's address in Sandakan. The dates, 3–4 February 2011 were public holidays in view of the Chinese New Year Festival.

[5] The defendant claimed that on 8 February 2011 after the Chinese New Year festival on or about Tuesday, the defendant received by mail the said writ. On 9 February 2011 the defendant by a letter dated 9 February 2011 instructed the defendant's solicitors to defend the action herein. On 16 February 2011 at about 2.32pm the defendant by a memorandum of appearance entered appearance at the High Court Registry at Sandakan. A copy of the same was also served on the plaintiff's solicitors by way of fax and courier.

[6] On 16 February 2011 at about 5.12pm the certificate of non-appearance was issued by the plaintiff and pursuant to the certificate of

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non-appearance the said JID was entered. On 28 February 2011 the defendant received by mail a letter dated 22 February 2011 from Messrs Alex Pang & Co, the plaintiff's solicitors enclosing a copy of the said JID dated 16 February 2011. On 1 March 2011 the defendant's solicitors by a letter dated 1 March 2011 applied to conduct a file search at the Registry of the High Court at Sandakan.

[7] On 3 March 2011 the defendant's solicitors received a notice of hearing dated 2 March 2011 from the High Court at Sandakan stating that the matter herein had been set down for assessment of damages on 12–13 April 2011. Upon receiving the said notice of hearing the defendant's solicitors applied for notes of proceedings of the case to be provided by the High Court to find out the circumstances under which the hearing of the assessment of damages was fixed.

[8] On 11 March 2011 the defendant immediately filed an application to set aside the said JID dated 16 February 2011, the certificate of non-appearance dated 16 February 2011 and the hearing of the assessment of damages. On 3 June 2011 the defendant's application to set aside the said JID came up for hearing before the learned judicial commissioner of the High Court who dismissed the defendant's application.

THE FINDINGS OF THE HIGH COURT

[9] The learned judicial commissioner of the High Court in dismissing the defendant's application to set aside the JID grounded his decision on the grounds which can be summarised as follows:

(a) the JID entered was a regular judgment. The defendant was late in entering appearance on the 16 February 2012. Once the writ of summons was posted to the defendant's registered address it became prima facie evidence that the documents were duly served after the relevant period of time prescribed by law for service of the writ. Accordingly, the said writ of summons posted by the plaintiff on the 29 January 2011 and after five days thereof was deemed to be served pursuant to s 12 of the Interpretation Act 1967. Thus, the defendant was deemed to have received the writ on the 2 February 2011 and the time limit for the defendant to enter appearance would be on the 11 February 2011;

(b) the defendant had failed to prove that the writ was received by them on the 8 February 2011. The onus of proving the same was on them by production of the post receipt or slip issued by the relevant post office (see *Yap Ke Huat & Ors v Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor* [2008] 5 MLJ 112 and *Pengkalen Concrete Sdn Bhd v Chow*

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Mooi (guarantor of Kin Hup Seng Construction Sdn Bhd) & Anor [2003] 3 MLJ 67; [2003] 6 CLJ 326);

(c) the memorandum of appearance filed by the defendant's solicitors was defective as it only had the defendant's solicitor's signature and seal without the official court stamp that would have indicated the date the appearance was entered and recorded in the official court cause book;

(d) the plaintiff was not in breach of r 56 of the Advocates (Practice and Etiquette) Rules 1988 ('Rules 1988'). The defendant was not represented, hence there was no solicitors on record to give the relevant notice of the purported JID that was going to be entered. Moreover r 56 of the Rules 1988 is a rule regulating the personal relationship in the legal profession and is not a substantive rule of law to be complied with (see *Asia Commercial Finance (M) Berhad v Bank Bumiputra Malaysia Berhad & Ors* [1988] 1 MLJ 33);

(e) the defendant had failed to show they have a bona fide defence on the merits; and

(f) the plaintiff's generally endorsed writ of summons sufficiently sets out the plaintiff's claim against the defendant. The defendant's contention that the plaintiff's concise statement endorsed in the writ which failed to give the relevant and sufficient particulars as to the true nature of its claim was totally misconceived.

THE FINDINGS OF THE COURT OF APPEAL

[10] The Court of Appeal affirmed the decision of the learned judicial commissioner of the High Court and in its decision, inter alia, stated as follows:

> We find that the JID entered on the 16 February 2011 was a regular judgment. The learned judicial commissioner was correct in his findings that the defendant was late in entering its appearance as based on the prima facie presumption the writ which was posted on the 29 January 2011 would have reached the defendant by the 2 February 2011. Under O 12 r 4 of the RHC, the time limited for the defendant to enter its appearance is ten days after the writ of summons is served (including the day of service). Under s 12 of the Interpretation Act 1967 service of a particular document by post shall be presumed to have been affected at the time when the letter would have been delivered in the ordinary course of post. Based on this presumption, the writ of summons posted by the plaintiff via registered post on the 29 January 2011 was deemed to have reached the defendant on 2 February 2011. Accordingly, the appearance should have been entered on or before the 11 February 2011. The presumption of posting is a prima facie evidence that a particular document is served after the relevant period of time. This presumption is rebuttable. The issue on presumption of posting of a writ was duly addressed in the case of *Yap Ke Heat & Ors v Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor* wherein His Lordship James Foong JCA (as he then was) remarked the following:

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Once the writ and statement of claim are sent by AR registered post, it is prima facie proof of service unless the defendant is able to rebut this.

We accept the foregoing statement as a correct statement of law and we have no reasons to depart from the same.

SUBMISSION OF THE DEFENDANT

[11] Learned counsel for the defendant in his submission on the two questions of law posed, impressed upon this court to consider the effect and application of O 13 r 6(1) of the RHC 1980 to the facts and circumstances of this case under which the JID was entered by the plaintiff against the defendant. Essentially it is the defendant's case that the effect of O 13 r 6(1) of the RHC 1980 is to preclude a plaintiff from entering judgment in default of appearance in every case in which the indorsement of the writ contains a claim which is not squarely within rr 1–4 of O 13 of the RHC 1980 notwithstanding the fact that the defendant has not entered appearance. It requires the plaintiff to serve a statement of claim on the defendant and proceed with the action as if that defendant had entered appearance.

[12] It is the contention of the defendant that O 13 r 1–4 of the RHC 1980 concerns respectively claims for liquidated demand, claim for unliquidated damages, claim relating to detention of moveable property and claim for possession of immovable property only. As such, if there is indorsed on the writ a claim for an account, injunction, specific performance, declaration or rectification or other remedy or relief which falls outside the descriptions specified in O 13 rr 1–4 of the RHC 1980, the plaintiff cannot enter judgment in default of appearance.

[13] For the defendant it was also argued that the said JID was irregular and was entered prematurely when in fact the defendant had duly entered its appearance by way of a memorandum of appearance at the registry of the High Court at Sandakan on 16 February 2011 and a copy of the same had been served on the plaintiff's solicitors within the time limited for entering an appearance which only expired on 17 February 2011. The defendant contended that it only received the writ on or about the 8 February 2011 and therefore would have ten days until 17 February 2011 to enter appearance at the Registry of the High Court at Sandakan and which the defendant had duly done by a memorandum of appearance entered in the registry on 16 February 2011 at 2.32pm.

[14] The said JID was entered purportedly in reliance of a certificate of non-appearance which was issued on 16 February 2011 at 5.12pm after the defendant had duly entered appearance at the registry. Thereafter, the said JID was only given or made and entered on 16 February 2011 at 5.15pm.

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[15] Learned counsel for the defendant further submitted that taking into consideration the sequence of the documents filed in court by the respective parties, it is clear that the defendant had entered its memorandum of appearance prior to the filing and sealing of the purported JID. The case of *Tan Tin Swee v Kangar Properties Sdn Bhd* [1990] 3 MLJ 167; [1990] 3 CLJ (Rep) 199 was cited to support the defendant's contention that the court can set aside the JID on the ground that the same was premature and irregular.

SUBMISSION OF THE PLAINTIFF

[16] As regards the two questions of law posed for the determination of this court learned counsel for the plaintiff submitted amongst others that the issue to be decided in this case depends on whether the plaintiff wished to pursue the claim for an injunction or not. It was contended that if the plaintiff wished to pursue the claim for an injunction, which was a specific relief granted under equity it would have to proceed under O 13 r 6(1) of the RHC 1980 and comply with the requirements of serving the statement of claim and then proceeding by summons for leave to enter judgment for the injunction.

[17] It was however contended for the plaintiff in this case that it wished to pursue its claim for unliquidated damages only. Therefore it could enter interlocutory judgment against the defendant for damages to be assessed and costs under O 13 r 2 of the RHC 1980, and O 13 r 6(1) of the RHC 1980 had no application to the plaintiff's case. By confining to the claim for unliquidated damages to be assessed and costs in the JID, the plaintiff had expressly elected to abandon its claim for an injunction which was a claim intended to be covered under O 13 r 6(1) of the RHC 1980. The two cases of *Yap Ke Huat & Ors v Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor* and *Morley London Developments Ltd v Rightside Properties Ltd* (1973) 231 Estates Gazette 235 were cited by the plaintiff to support its contention.

[18] On the issue as to whether the JID was entered regularly learned counsel for the plaintiff in reply submitted that the writ was served by registered post. It was posted on 29 January 2011 as shown in the post office slip proving the posting on 29 January 2011. After taking five days for the ordinary post to deliver, the writ was deemed served on 2 February 2011. The time limit for the defendant to enter appearance being ten days including the day of service was 11 February 2011. The defendant had failed to adduce evidence to rebut the presumption of service by failing to produce objective or independent evidence of the post receipt or slip to prove that the writ was received on the date it claimed on 8 February 2011. The only evidence the defendant produced was its own self-serving statement that the defendant received it on that date.

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THE DECISION OF THIS COURT

[19] We shall first deal with the contention of the defendant that it had duly entered its appearance within the time limited for entering an appearance which only expired on 17 February 2011. The defendant contended the said JID was irregular and was entered pre-maturely when in fact the defendant had duly entered its appearance by way of memorandum of appearance at the registry of the High Court at Sandakan on 16 February 2011. The defendant claimed that it only received the writ on or about 8 February 2011 and therefore would have ten days until 17 February 2011 to enter appearance.

[20] With respect to the above contention of the defendant in view of the finding of facts made by the learned judicial commissioner of the High Court and affirmed by the Court of Appeal that the defendant had failed to prove that the writ was received by them on 8 February 2011, it is our considered view that the defendant is in a weak position to argue again on this issue before this court. It is a settled principle of law that an appellate court would be slow in interfering with the finding of facts and decision made by the trial judge unless the said decision can be said to be plainly wrong. It is the plaintiff's case that the defendant was late in entering its appearance based on the prima facie presumption that the writ was posted on 29 January 2011 and would have reached the defendant by the 2 February 2011. The presumption of posting was rebuttable but the courts below found on the evidence available that the defendant had not rebutted this presumption (see the case of *Yap Ke Huat & Ors v Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor*).

[21] We shall now deal with the two questions of law posed for the determination of this court. In the present case the plaintiff had indorsed its writ with a general statement allegedly for trespass against the defendant. The plaintiff's generally indorsed writ shows that they are seeking for a restraining order and damages, and by virtue of O 13 r 6(1) of the RHC 1980 there is no discretion given to the plaintiff not to serve a statement of claim.

[22] Pursuant to O 13 r 6(1) of the RHC 1980, it is mandatory for the plaintiff to serve a satement of claim on the defendant and proceed with the action as if the defendant had entered an appearance. This, the plaintiff had failed to comply. Order 13 r 6(1) of the RHC 1980 provides as follows:

> 6(1) Where a writ is indorsed with a claim of a description not mentioned in rules 1 to 4, then if any defendant fails to enter an appearance, the plaintiff may, after the time limited for appearing and upon filing an affidavit proving due service of the writ on that defendant and, where the statement of claim was not indorsed on or served with the writ, upon serving statement of claim on him, proceed with the action as if that defendant had entered appearance.

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[23] The case on point in respect of application of O 13 r 6(1) of the RHC 1980 is *Lai Yoke Ngan & Anor v Chin Teck Kwee & Anor* [1997] 2 MLJ 565 (FC) wherein the appellants (the plaintiffs) caused to be issued a writ against the respondents (the defendants) on which there was indorsed besides a claim for several declarations and injunctions there was also a claim for damages. The plaintiffs obtained default judgment. The defendants entered appearance and took out a summons by which they sought to set aside only so much of the order as directed on assessment of damages. This was followed by a second summons dated 1 April 1992, by which the defendants applied to have the writ struck out on the ground that the indorsement upon it did not disclose any cause of action. Subsequently, upon hearing both the summonses, the learned judge set aside the whole of the JID and he also struck out the writ. The plaintiffs appealed against the orders, setting aside the judgment in default (the first appeal) and striking out of the writ (the second appeal). The Federal Court dismissed the first appeal but allowed the second appeal. His Lordship Mohd Azmi FCJ had this to say (headnote):

> On the facts, it was clear that the judgment in default (the subject matter of the first appeal) was irregular for non-compliance with the RHC — in particular O 13 r 6(1) — by failing to serve a statement of claim on the defendants. On this ground alone, the entire judgment in default ought to be set aside. There can be no dispute that the procedural irregularity in the failure to serve the statement of claim on the defendants before the judgment in default was entered, just as the order to assess damages in the absence of judgment granting damages, had prejudiced the defendants and therefore beyond curability.

His Lordship Gopal Sri Ram JCA (as he then was) in the same case at p 580 C–G observed as follows:

> Taking the first argument, it is beyond dispute that the plaintiffs, by the indorsement to the writ, principally claimed specific relief. The claim for general damages was a mere adjunct to the main relief. The defendants admittedly did not enter an appearance to the writ. But did that entitle the plaintiffs to enter judgment in default in the form in which they did? The answer to that question must, I think, be derived from the relevant rule of court that governs a case such as the present. It is common ground that that rule is O 13 r 6(1) ...
>
> The wording of the rule makes it plain that, in the present case, the plaintiffs were clearly not entitled to enter judgment in the form in which they did. Since the conditions precedent prescribed by O 13 r 6(1) were absent, the judgment entered against the defendants was irregular and was therefore liable to be set aside.

[24] Still on the application of O 13 r 6(1) of the RHC 1980, in the case of *Taman Pangkor Sdn Bhd v Doric Development Sdn Bhd & Ors* [1987] CLJ (Rep) 1008, Peh Swee Chin J (as he then was) at p 1009 observed as follows:

> It is clear from O 13 rr 1–6 of the Rules of the High Court that the prayers (1), (2) and (3) of the statement of claim as set out above, were not of the description mentioned in O 13 rr 1–5, but fitted in squarely with O 13 r 6(1) so that the

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plaintiff would be precluded from entering judgment for default of appearance forthwith, and would be, notwithstanding the non-appearance, required to proceed with the action as if the defendant had entered an appearance.

[25] We are of the view, clearly, the said JID entered in the present case is in breach of the terms of O 13 r 6(1) of the RHC 1980 and that it may be set aside *ex debito justitiae*. This is because in the first place the plaintiff should not have entered the irregular judgment and it should not be allowed to take advantage of its own non-compliance of the rules. On this point useful reference can be made to the case of *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30 (FC) wherein the Federal Court held that:

It is elementary that an irregular judgment is one which has been entered otherwise than in strict compliance with the rules or some statute or is entered as a result of some impropriety which is considered to be so serious as to render the proceedings a nullity. The general rule is that when it is clearly demonstrated to the satisfaction of the court that a judgment has not been regularly obtained, the defendant is entitled to have it set aside *ex debito justitiae*, that is to say, irrespective of the merits and without terms.

[26] We would also refer to the case of *White v Weston* [1968] 2 All ER 842 (CA) wherein the English Court of Appeal held that a judgment should be set aside unconditionally *ex debito justitiae* because it was a plain case of the defendant being totally unaware of the proceedings at all. Russell LJ said this at p 846:

There has in the past been much discussion whether a judgment is a nullity or a mere irregularity, and for the cases on the subject I may perhaps refer to *Re Pritchard (decd)* [1963] 1 All ER 873; [1963] Ch 502 where they were discussed. Up John LJ in that case expressly stated at pp 882–883; at pp 523–524 to be a nullity proceedings which ought to have been served, but have never come to the notice of the defendant at all, excluding, of course, cases of substituted service, service by filing in default, or cases where service has properly been dispensed with. Danckwerts LJ adopted that judgment. I do not myself attach importance to the question whether it is proper to label a judgment obtained in circumstances such as this as 'irregular' or 'a nullity'. The defect is in my judgment so fundamental as to entitle the defendant as of right, *ex debito justitiae*, to have the judgment avoided and set aside. If as a technical matter it is a matter of discretion to set aside the judgment: '... in accordance with settled practice, the court can exercise its discretion only in one way, namely, by granting the order sought', to quote Up John LJ in *Re Pritchard (decd)* [1963] Ch 502 at p 521.

[27] Learned counsel for the plaintiff argued that it was entitled to abandon its other claim for injunction and proceeds with its claims for unliquidated damages only and enter the said JID under O 13 r 2 of the RHC 1980. Under O 13 r 2 of the RHC 1980, it provides:

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A Where a writ is indorsed with a claim against a defendant for unliquidated damages only, then, if that defendant fails to enter an appearance, the plaintiff may, after the time limited for appearing, enter interlocutory judgment against that defendant for damages to be assessed and costs, and proceed with the action against the other defendants, if any.

B

[28] With respect to the above contention of the plaintiff we are of the view under O 13 r 2 of the RHC 1980, a plaintiff is entitled to enter interlocutory judgment for damages to be assessed in default of appearance where the plaintiff's claim against a defendant is for unliquidated damages only. A C plaintiff may similarly enter judgment in default under rr 1, 3 and 4 of O 13 of the RHC 1980 respectively for a liquidated demand only, for detention of moveable property only and for possession of immovable property only.

D **[29]** It is clear that the pre-requisite for the operation of O 13 rr 1–6 of the RHC 1980 is dependent on the type of claims indorsed in the writ by the plaintiff and not on what was subsequently contained in the default judgment. In the present case, the plaintiff entered the said JID under O 13 r 2 of the RHC 1980 in respect of one of its claims, namely 'damages to be assessed' E despite the fact that it had also claim for a restraining order. It is noted that the indorsement on the writ was not for unliquidated damages only. The plaintiff had indorsed its writ with a general statement allegedly for trespass against the defendant, principally claiming for specific relief, namely, a restraining order. The claim for general damages was a mere adjunct to the main relief and cannot F be construed to be an alternative claim.

[30] The plaintiff purported to rely on the Court of Appeal's judgment in the case of *Yap Ke Huat Ors v Pembangunan Warisan Murni Sejahtera Sdn Bhd & Anor* and contended that it could abandon its other claim and confined its G claim for unliquidated damages to be assessed only. We are of the view the decision of *Yap Ke Huat* is distinguishable on the facts and has no application to the present case. In *Yap Ke Huat* the statement of claim had been duly served on the defendant unlike in the present use. The decision in *Yap Ke Huat* in respect of O 13 of the RHC 1980 was based solely on the decision of *Morley* H *London Developments Ltd v Rightside Properties Ltd* (1973) 231 Estates Gazette 235 which dealt with a completely different order, namely O 19 rr 3 and 7 of the English Rules of Court in relation to entering of judgment in default of defence whereby a statement of claim had been duly served on the defendant.

I **[31]** Another distinguishing feature in *Yap Ke Huat* and *Morley London Developments Ltd* is that the plaintiffs in the said two cases had clearly indicated their intention of abandoning the prayer for specific performance to the defendant and the court prior to the entering of the default judgment of defence. However, the plaintiff in the present case did not inform either the

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defendant or the court regarding their abandonment of claim outside the scope of O 13 rr 1–4 of the RHC 1980. The plaintiff has failed to make it clear that the claim for 'restraining order' which was outside the scope of O 13 rr 1–4 of the RHC 1980 has been abandoned.

[32] A local case directly on point to show that the plaintiff has to make an election informing the court that it was abandoning the relief for injunction and proceeding only on other relief is the case of *Badrul Zaman bin PS Md Zakariah v Tamil Nesan (M) Sdn Bhd & Ors* [2001] 4 MLJ 403 (HC). In this case the subject matter of the appeal concerned an alleged act of defamation by the first defendant against the plaintiff and among the reliefs sought by the plaintiff were an injunction and general damages. The plaintiff entered default judgment for general damages to be assessed. His Lordship PS Gill J (as he then was) in setting aside the default judgment had this to say at p 408 C–H:

> With respect to the case at hand, I tend to agree with the submission of Dr Cyrus Das that the plaintiff had short circuited the whole process involved in O 13 r 6 of the RHC, and proceeded in unholy haste to enter judgment on 30 May 2001. The plaintiff did not appreciate the fact that a notice of motion should have been filed in view of the reliefs that he had prayed for, before a judgment is entered into. The plaintiff's counsel, Mr Manoharan, on realising his blunder, and in order to salvage the judgment, immediately informed the court at the hearing of the appeal, that he was abandoning the relief for injunction, and was proceeding purely on the other reliefs. To this sudden turn of events, I have my reservations as to whether the plaintiff is entitled, at this point of time, to make this election.
>
> I am cognisant of the fact that the plaintiff is free to elect which relief he wants to pursue, and he is under no duty to give notice of this election to abandon any form of relief, which he originally claimed, and on effective abandonment of every remedy or relief outside the description in sub-r(1)–(4), he is entitled to a judgment under these Rules (please see *Morley London Developments Ltd v Rightside Properties Ltd* (1973) 117 SJ 876 (CA)).
>
> But from my understanding and reading of this authority, *the effective abandonment of the said reliefs should be done before the said judgment is entered into, and not after the judgment has been entered, and perfected. The conduct of the plaintiff's counsel presently in reguesting the abandonment of the said reliefs to use a proverbial phrase, amounts to 'closing the stable door, after the horse has bolted'. I could not at this stage allow such an abandonment, more especially when the said judgment is now being castigated for this very reason. Viewed dispassionately, and bearing in mind the dicta of Gopal Sri Ram JCA in Lai Yoke Ngan, I am convinced that the judgment in default entered on 30 May 2001 is irregular*. (Emphasis added.)

CONCLUSION

[33] For the reasons abovestated we would answer Questions (a) and (b) posed in this appeal in the affirmative. The appeal is therefore allowed with costs here and in the courts below.

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Appeal allowed with costs.

Reported by Afiq Mohamad Noor